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In the Supreme Court of the United States

No. 75-1064

JACK B. KREMENS, Individually and as Hospital Director of Haverford State Hospital; FRANK S. BEAL, Individually and as Secretary of Public Welfare of the Commonwealth of Pennsylvania; WILLIAM B. BEACH, JR., Individually and as Deputy Secretary for Mental Health and Mental Retardation of the Department of Public Welfare of the Commonwealth of Pennsylvania,

Appellants

v.

KEVIN BARTLEY; STEVE GENTILE; LESLIE LEVINE; VICKI MATHEWS; MARK WEAND; Minors, Through Their Next Friend, Individually and on Behalf of All Others Similarly Situated,

Appellees

Appeal From the Judgment of the United States District Court for the Eastern District of Pennsylvania.

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

ARGUMENT

I. This Case Should Be Decided on the Merits

On July 9 of this year the Mental Health Procedures Act was enacted,[1] establishing revised procedures for the commitment of emotionally ill persons in Pennsylvania. However, this act does not apply to the mentally retarded and therefore affects only a small portion of the plaintiff class.[2] Moreover, with respect to the mentally ill, the only change in the law relevant to this appeal is that the age below which a mentally ill child can be voluntarily admitted by his parents has been lowered from eighteen years to fourteen.[3]

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[1] Act of July 9, 1976, P.L. ——, No. 143 (hereafter referred to as the "new act", or "Act 143"). The relevant portions of this Act have been set out in Appellees' Brief (hereafter "App. Br.") at pages 2-5.

[2] Approximately 80% of the plaintiff class is comprised of mentally retarded children. In fact, as of June 30, 1976, of the 4996 juveniles receiving inpatient treatment in Pennsylvania institutions, as the result of voluntary placements, only 1209 were mentally ill (310a et seq.—current census).

[3] There has been no real change in the law with respect to who is authorized to challenge the validity of a mentally ill child's commitment. 50 Pa. Stat. Ann. §4426(a) authorizes the child ". . . or anyone acting on his behalf . . ." to challenge the commitment, and the Mental Health Procedures Act provides

1. This appeal is not moot. On April 29, 1975, the lower court properly certified this as a class action. The plaintiff class was defined as comprising ". . . all persons eighteen years of age or younger who have been, are or may be admitted to mental health facilities in Pennsylvania pursuant to the challenged provisions of the state mental health law (i.e., 50 P.S. §§4402 and 4403)" (270a).[4] When the class was certified the named plaintiffs were all under eighteen years of age and receiving inpatient treatment in a mental health facility pursuant to the specified provisions of the 1966 Act. Thus, these individual plaintiffs were in fact members of the class when it was certified, and therefore remain proper representatives of that class, despite the fact that their individual claims may have become moot by the subsequent enactment of this legislation.[5] *Franks v. Bowman Construction Co., Inc.*, 424 U.S. 747 (1976). *Sosna v. Iowa*, 419 U.S. 393 (1975).

Sections 402 and 403 of the Mental Health and Mental Retardation Act of 1966 presently apply, and in fact are being applied, to the vast majority of the unnamed plaintiffs. And, those who are still subject to the challenged portions of the 1966 Act obviously continue to have a live controversy with the defendants. *Franks v. Bowman Construction Co., Inc., supra, Sosna v. Iowa, supra, Gerstein v. Pugh*, 420 U.S. 103 (1974), *Richardson v. Ramirez*, 418 U.S. 24 (1973), *Dunn v. Blumstein*, 405 U.S. 330 (1972).[6]

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that ". . . any responsible party" may contest the child's placement, Sec. 206(b) (App. Br. 4). Nor have any additional procedural protections been supplied by the new act for mentally ill children under fourteen years of age.

[4] No issue has been raised in this appeal regarding the propriety of that class certification.

[5] Moreover, certain mentally retarded plaintiffs specifically identified by the court are not affected in the least by the new law (789a-790a).

2. This case should not be remanded to the district court for consideration of the Mental Health Procedures Act. Over three-fourths of the plaintiff class, mentally retarded juveniles, are subject to the very statutes which the lower court examined, declared unconstitutional, and enjoined.[7]

Additionally, the due process issue has not changed in the least for emotionally ill children under fourteen years of age. In Act No. 143 the Pennsylvania General Assembly, in disagreement with the majority below, has provided those children with none of the protections man-

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[6] Lower courts, as well, have uniformly recognized that a case does not become moot simply because the class representative may have had his claim settled, provided that a live controversy exists between unnamed members of the class and the defendants; *Valentino v. Howlett*, 528 F.2d 975 (7th Cir. 1976); *Allen v. Likins*, 517 F.2d 532 (8th Cir. 1975); *Ramer v. Saxbe*, 522 F.2d 695 (D.C. Cir. 1975); *Troy v. Shell Oil Co.*, 519 F.2d 403 (6th Cir. 1975); *Jones v. Diamond*, 519 F.2d 1090 (5th Cir. 1975); *Doe v. Mundy*, 514 F.2d 1179 (7th Cir. 1975); *Frost v. Weinberger*, 515 F.2d 57 (2nd Cir. 1975); *Taylor v. St. Vincent's Hospital*, 523 F.2d 75 (9th Cir. 1975); *National Broadcasting Co. Inc. v. F.C.C.*, 516 F.2d 1101 (D.C. Cir. 1974).

Compare: *Hall v. Beals*, 396 U.S. 45 (1969), *Board of School Commissioners of the City of Indianapolis v. Jacobs*, 420 U.S. 128 (1975), and *Weinstein v. Bradford*, 423 U.S. 147 (1975); each of which was either not brought, or not effectively certified as a class action.

[7] The stay granted on December 16, 1975 allows the continued use of Sections 402 and 403 of the 1966 Act, as well as the regulations promulgated thereunder, 423 U.S. 1028-9 (1975).

dated in this case. Juveniles, whether by §402 and §403 of the 1966 Act, or §201 of Act 143, may still be committed to a Pennsylvania mental health facility solely on the basis of the joint decision of the parent and physician. Thus, in all relevant respects both Acts are identical, and the district court has already clearly expressed its view that this scheme is unconstitutional.[8] There is, therefore, nothing additional in the way of procedural protections for children in the new act for the lower court to consider on remand. *National Independent Coal Operators Association v. Kleppe*, 423 U.S. 388, 393-4 n. 4 (1975).

II. The Merits: Admission of Children to Pennsylvania Mental Health Facilities

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It is relatively difficult to secure in-patient psychiatric services in a Pennsylvania mental health facility. And, in some respects the difficulties are compounded when parents seek these services for their children.[9] For

[8] Appellees correctly point out that the district court was in fact made aware of the possibility that the Legislature might reduce the age for voluntary admissions from eighteen years to fourteen (240a-241a, 654a). However, this change with respect to the emotionally ill obviously did not satisfy the court's objections to the procedure. Similarly, the court specifically analyzed and rejected the regulations set out at pages 9-15 of Appellants' Brief (236a-250a, 504a, 556a-558a, 598a).

[9] The record in this case shows that, with respect to the mentally retarded, the admission process for children is usually initiated by the child's parents or other responsible family member. Of the total admissions, nearly 75% were sought by the parents or, where appropriate, another relative (224a, 225a).

example, the defendants' regulations require an additional medical examination prior to a child's admission as compared to the admission of an adult. The regulations also impose a broad array of procedural measures for children over age thirteen (Appellants' Brief, pp. 12-15). For these and other obvious reasons parents are generally reluctant to seek inpatient psychiatric care for their children.[10] Nonetheless, like other public health delivery systems, the need for these services is much greater than the supply.[11]

Notwithstanding these considerations, the plaintiffs have argued that children are often whimsically admit-

[10] "Parents are often even more frightened than their teenage child by the prospect of admission." Shade, R. H., *Parental Resistance to Hospital Treatment of Adolescents*, 4 Adolescence 512, 514 (1969).

[11] The President's Committee on Mental Retardation has noted that ". . . since most public institutions operate at or above capacity, the delay between applying for and gaining admission is usually great. Often it is more than three years." President's Committee on Mental Retardation, *Changing Patterns in Residential Services for the Mentally Retarded*, at 17 (1969).

Nationally there has been a decrease in the number of residents under age eighteen receiving inpatient services in state and county mental hospitals each year since 1971. Department of Health, Education and Welfare, NIMH, *Statistical Note 113, State Trends in Resident Patients—State and County Mental Hospital In-Patient Services 1967-1973*, 1 (Feb., 1975). A similar decrease has been noted in Residential treatment of retarded juveniles, National Association of Superintendents of Public Residential Facilities for the Mentally Retarded, *Current Trends and Status of Public Residential Services for the Mentally Retarded: 1974*, 53 (1975).

ted [12] to mental health facilities. The mentally retarded, they asserted ". . . often find themselves in institutions through fortuitous and avoidable circumstances" (App. Br., p. 42).

The plaintiffs discussed two specific cases in support of this contention, and selected portions of the patients' records were relied upon (App. Br., pp. 42-43). However, in these purported examples of inappropriate admissions, the plaintiffs looked only to the "reason for placement" and did not note the medical diagnoses of these children.

For example, the plaintiffs correctly noted that the first child's records indicated that the additional familial burdens which were created by the arrival of infirm grandparents on the family scene was noted a "reason for placement" (351a). But, plaintiffs chose to ignore the medical condition of this child:

Diagnosis (October 1, 1963):

AAMD

Mental Retardation associated with Encephalopathy due to anoxemia at birth
Visual handicap

[12] However, it has been noted that "[o]f all referrals made to residential centers, only 15 to 20% are accepted, with the majority of referrals not accepted, interestingly enough, on the basis that residential treatment is not indicated. Other reasons for nonacceptance of the referral are unavailable space, center policy, and inappropriate age." Sonis, M, "Residential Treatment", Freedman, ed. *Comprehensive Textbook of Psychiatry*, Williams and Wilkins, Baltimore (1967) at 1475.

Hearing handicap
Major motor seizures
Choreoathetosis
Spastic quadriplegic

APA

Chronic Brain Syndrome associated with birth trauma (anoxemia due to cord being wrapped around neck)
Mental deficiency (x [4])—Severe
(Patient No. 00067-382a)

In their second case, the plaintiffs conjectured that the parents sought inpatient care for their child ". . . to avoid providing their child with birth control, and in order to evade a responsible relative who opposed the child's commitment . . ." (App. Br., p. 43). Plaintiffs' grim account once again failed to consider the medical condition of that child.

Diagnosis (December 27, 1963):

AAMD

Mental retardation associated with encephalopathy due to anoxemia at birth
Spastic paraplegia
Level II—Adaptive Behavior—Trainable

APA

Chronic Brain Syndrome due to unknown cause without qualifying phrase
Mental deficiency (x [4])—Severe

Reevaluated diagnosis (March 18, 1974):

AAMD

Trauma or physical agent—perinatal hypoxia
Hydrocephalus, secondary
Spasticity with paraplegia, moderate
Adaptive Behavior—Level III (1973 Revised Classification)
(Patient No. 00144—353a) [13]

The point of all this is quite obvious. The propriety of inpatient psychiatric care for a child must be measured primarily against the medical needs of that child. The various concerns the child's parents may have expressed during the admission process may be of some importance to the physician in determining how best to treat those needs—but they clearly are not, and should not alone be controlling.

This seemingly self-evident proposition was made very clear by Dr. Levon D. Tashjian in testimony given in this case (650a). Unfortunately, however, the lower

[13] In this example, as with the first, the plaintiffs relied exclusively on the section of the summarized patient records entitled "reasons for placement".

00144 (Patient number)—Reason for Placement:

"The father described her as hyperactive, but the mother disagreed and said that she was only active. Though the parents stated that she was well accepted at home, they felt that now that she is entering pubescence, it will be better for her to be admitted at this time. The maternal aunt who had been caring for her was away and since she was the one against placement, the parents felt that this was the time to arrange for placement. The brothers, though they love ————, are uncomfortable in her presence" (353a).

court, like the plaintiffs, chose to rely on a distorted picture of the facts surrounding the admissions of these children to Pennsylvania facilities. [14] This error in large part provided the basis for the opinion in this case and therefore necessitates its reversal.

III. The Remedy of Habeas Corpus Is Available to the Plaintiffs

The right of a mental patient to seek release from custody by habeas corpus is firmly established in Pennsylvania. Section 4426 of the Mental Health and Mental Retardation Act of 1966 provides that the remedy is available to "[e]very person committed or detained in a facility by reason of the provisions of this act . . ." 50 Pa. Stat. Ann. §4426 (set out at pp. 8-9 of Appellants' Brief).

Nevertheless, plaintiffs argue that this broad language does not extend to admissions of juveniles under Sections 402 or 403 of the Act (App. Br., p. 83). The argument is based upon a misreading of the statute. The plaintiffs contend that the inclusion in §4426(c)(1) of specific jurisdiction and venue requirements for challenging commitments under Sections 404 and 405 of the Act makes habeas corpus unavailable to test admissions pursuant to other sections of the Act.

[14] Rather than examining the medical records of all juveniles as suggested by the defendants (288a-289a) the lower court chose only to admit the medical records of ten randomly selected patients (522a, 650a). After having done this, however, the court then apparently ignored these records and based its conclusions on the "reasons for placement" alone (789a-790a).

The inclusion of specific jurisdiction and venue provisions in §4426 is an exception to the general habeas corpus jurisdiction and venue rules which are set out in the Act of May 25, 1951, P.L. 415; 12 Pa. Stat. Ann. §1901. Thus, the Legislature provided in §4426 that ". . . except as hereinafter provided, said petition [for writ of habeas corpus] shall be filed in accordance with the provisions of the Act of May 25, 1951 (P.L. 415)." Therefore, sections challenging any admissions or commitments other than those specified in §4426 must be filed pursuant to the general rules set forth in the 1951 Act:

> "Any judge of a court of common pleas within this Commonwealth shall have jurisdiction at any time, to issue a writ of habeas corpus upon application by, or on behalf of, any person (hereafter called the relator) alleged to be unlawfully imprisoned or detained in any penitentiary, prison, reformatory, house of detention, *mental institution,* or other place, (a) within the judge's judicial district, or (b) outside of his judicial district, if the relator was committed by action of any court of the judge's judicial district: Provided, That when relator's detention or confinement is by virtue of sentence after conviction for a criminal offense, only a judge and the judicial district of conviction and sentencing shall exercise such jurisdiction." 1951, May 25, P.L. 415, §1. (Emphasis added.)

Finally, the Supreme Court of Pennsylvania has noted that, over and above this statutory remedy, a very broad common-law right of habeas corpus has always existed in Pennsylvania.

> ". . . 'It (common law habeas corpus ad subjiciendum) has a much broader scope than that form of it which is secured by the Habeas Corpus Act; for it may issue in all sorts of cases where it is shown to the court that there is probable cause for believing that a person is restrained of his liberty unlawfully or against the due course of law' ". *Com. ex rel. Levine v. Fair,* 394 Pa. 262, 278 (1958); quoting *Williamson v. Lewis,* 39 Pa. 9, 29 (1861).

The plaintiffs had both a statutory and common-law right to test the legality of their confinement by seeking a writ of habeas corpus. They chose to ignore this remedy seeking redress instead under the Civil Rights Act. Therefore, at a minimum, this Court's holding in *Preiser v. Rodriguez,* 411 U.S. 475 (1973), requires reversal of the retroactive portions of the lower court's order alternatively requiring the plaintiffs' release.

CONCLUSION

On the basis of the foregoing arguments and authorities, as well as those contained in the main brief for Appellants, defendants seek reversal of the decision of the lower court.

Respectfully submitted,

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